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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MICHAEL L., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

MARCO Z. et al.,

Defendants and Appellants.

D041587

(Super. Ct. No. J513702E)

APPEAL from a judgment of the Superior Court of San Diego County, Cynthia Bashant, Judge. Affirmed.

Marco Z. and Maria L. appeal a judgment terminating their parental rights to their minor son Michael L. under Welfare and Institutions Code¹ section 366.26. Marco

¹ Statutory references are to the Welfare and Institutions Code.

contends the court erred in: (1) relying on an inadequate assessment report and not granting a continuance to obtain an adequate one; and (2) failing to find termination of his parental rights was not in Michael's best interests. Marco and Maria contend the court erred in finding there was no beneficial parent-child relationship or substantial sibling relationship to preclude terminating parental rights. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Michael's four older siblings became dependents of the court before Michael was born as a result of Marco's mental illness and possible drug use, and Maria's inability to protect herself or her children from domestic violence. When Michael was born in May 2001, he was detained out of home because Maria was only minimally complying with her reunification plan, she had not yet shown she had reduced the risk of violence in the home and she was having only supervised visits with the siblings. Marco was not complying with his reunification plan.

In September 2001, Michael became a dependent of the court under section 300, subdivision (b) based on findings he was at risk of serious physical harm because his siblings had been exposed to physical violence between the parents in the family home and his parents were not cooperating with services. The court removed Michael from parental custody, placed him in foster care and ordered the parents to participate in services.

At the time of the six-month review hearing, the San Diego County Health and Human Services Agency (Agency) reported Maria was complying with her case plan and visiting her children. Marco was incarcerated and had not visited the children. The court

continued Michael as a dependent in foster care, continued services for Maria but terminated services for Marco. The court gave the social worker discretion to allow Marco to visit Michael and authorized funds for Marco to make collect telephone calls to him.

By the 12-month review, Maria was unable to show she could provide for Michael's needs. Michael had regular visits with Maria and his siblings. The visits were appropriate but Maria could attend to only one child at a time. When all the siblings were together, she seemed confused and tense and had difficulty making decisions. Maria said she did not want to lose custody of Michael, but she could not give him what he needed and felt emotionally detached from him because he was removed from her at birth. Marco remained incarcerated and had not contacted the social worker.

At a contested hearing, the court found returning Michael to parental custody would be detrimental and reasonable services had been provided. The court terminated services and set a section 366.26 selection and implementation hearing.

In an assessment report, social worker Bettina Heitmann stated Michael was adoptable based on his age, good physical health, normal development and friendly nature. He had been living with his current caretakers since he was one week old and they were committed to adopting him. Michael called them "mama" and "papa." A home study had been initiated and the caretakers were likely to be approved for adoption. There were 51 other approved adoptive families willing to adopt a child like Michael.

Heitmann had observed three visits Michael had with Maria and his siblings and concluded there was no beneficial parent-child relationship. Although Maria consistently

visited Michael, he had never lived with her and Maria admitted she did not feel bonded to him. There was little interaction between Michael and Maria during visits. Michael did not react at the end of visits but seemed happy to see his caretakers. The former social worker arranged visits between Michael and Marco, but Marco did not contact her.

Michael visited his siblings every week but he did not have a strong bond with them. Heitmann believed the benefits of stability for Michael outweighed the detriment of severing the sibling relationship. Michael's prospective adoptive family was willing to have Michael visit his siblings on a regular basis.

At a contested selection and implementation hearing, Heitmann testified the feedback she received from Michael's caretakers and the maternal aunt who supervised visits was similar to her own observations of visits between Maria and Michael. Maria fed Michael at visits and was affectionate toward him. In response, Michael smiled at her and seemed comfortable in her presence. Maria never missed a visit. However, Heitmann concluded Michael did not have a parent-child relationship with either parent and it would not be detrimental to Michael if parental rights were terminated. Heitmann did not observe any visits between Marco and Michael and had not tried to arrange visits or contact him. She knew Marco was incarcerated in San Diego and would remain in prison throughout the dependency proceedings.

Heitmann further testified the siblings were excited to see Michael. They ate and played with him. However, Heitmann believed the sibling relationship exception did not apply. Michael had never lived with his siblings and other than weekly visits at McDonald's, he did not see or communicate with his siblings.

Maria testified she saw Michael once a week for four hours. She played with him, fed him and tried to talk to him. She could not bond with Michael because the visits were in a public place and it was difficult to get Michael's attention. Her other children tried to play with Michael, but he was too young to bond with them.

After considering the evidence and hearing argument of counsel, the court found Michael was likely to be adopted and none of the exceptions of section 366.26, subdivision (c)(1) applied to preclude terminating parental rights. The court terminated parental rights and referred Michael for adoptive placement.

DISCUSSION

I

Marco contends the court erred in relying on an inadequate assessment report to support terminating his parental rights. He asserts the social worker failed to observe or adequately assess Michael's needs and interests, specifically, the nature of contact he had with Marco and other family members. He further asserts the court should have granted his request for a continuance to have Agency prepare an adequate report.

A

To the extent Marco is challenging the sufficiency of the assessment report, he has waived this issue by failing to timely raise it in the trial court. (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 411; *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *In re Urayna L.* (1999) 75 Cal.App.4th 883, 886.) Agency filed its assessment report on November 8, 2002, in anticipation of the selection and implementation hearing originally scheduled for November 26 but continued to January 22, 2003. Thus, Marco was aware that Agency

was recommending terminating his parental rights based on its assessment of Michael's best interests, including the absence of a beneficial parent-child relationship. At the selection and implementation hearing, Marco's counsel cross-examined the social worker who prepared the assessment report and expressly stated he had no objection to the court receiving the report into evidence. Because Marco did not object to any deficiencies in the assessment report, tested its sufficiency through cross-examination of the preparer and agreed to its admission into evidence, he is precluded from making this argument on appeal. (*In re Crystal J.*, *supra*, 12 Cal.App.4th at p. 411.)

B

Marco asserts the issue was preserved because counsel requested, in closing argument, "a continuance based on the lack of evidence in the assessment regarding a bond." However, even if this belated objection was sufficient to avoid the waiver rule, the assessment report provided adequate information for the court to determine the appropriate permanent plan for Michael.

When the court terminates reunification services and sets a selection and implementation hearing, it must direct Agency to prepare an adoption assessment report which includes the amount of contact the child has had with his or her parents and other relatives. (§ 366.21, subd. (i); see also §§ 361.5, subd. (g), 366.22, subd. (b).) The purpose of the assessment report is to provide the juvenile court with information necessary to determine whether adoption is in a child's best interests. (See *In re Dakota S.* (2000) 85 Cal.App.4th 494, 496.) An assessment report need not be entirely complete as long as it is in substantial compliance with statutory requirements. (*In re*

John F. (1994) 27 Cal.App.4th 1365, 1378; *In re Diana G.* (1992) 10 Cal.App.4th 1468, 1481.) Where an assessment is deemed incomplete, the reviewing court looks at the totality of the evidence before it; deficiencies go to the weight of the evidence and may prove insignificant. (*In re John F.*, *supra*, 27 Cal.App.4th at p. 1378; *In re Crystal J.*, *supra*, 12 Cal.App.4th at p. 413.) Thus, if an assessment report does not fully comply with all statutory requirements, it may still provide sufficient information to assist the juvenile court in finding adoption is in the minor's best interest.

Here, the assessment report substantially complied with statutory requirements. It contained a detailed description of visits Michael had with Maria and his siblings as observed by social worker Heitmann. The report also noted the former social worker had arranged for visits between Michael and Marco, but Marco, who remained incarcerated throughout the proceedings, failed to contact the social worker to implement visits. Thus, the amount and nature of contact between Michael and his parents and siblings was reported, to the extent any contact occurred.

Further, the assessment report was supplemented by Heitmann's testimony and other evidence before the court. (*In re Crystal J.*, *supra*, 12 Cal.App.4th at p. 413.) Although Heitmann testified she had not observed visits or attempted to arrange visits between Michael and Marco during the assessment process, she was familiar with the history of the case, including the amount and nature of visitation between Michael and his parents, and concluded adoption was in Michael's best interests. Other evidence showed Marco did not comply with his reunification plan or otherwise cooperate with Agency. The totality of the evidence before the court provided an adequate basis for

selecting and implementing adoption as Michael's permanent plan. (See *In re Heidi T.* (1978) 87 Cal.App.3d 864, 875 [possible deficiencies in assessment report harmless error in light of other evidence].) Thus, Marco was not entitled to a continuance of the selection and implementation hearing to obtain another assessment report.²

II

Maria and Marco challenge the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception under section 366.26, subdivision (c)(1)(A) did not apply to preclude terminating their parental rights. Maria asserts she maintained regular visitation and contact with Michael who would benefit from continuing the relationship. Marco joins in Maria's argument and further asserts the court's failure to enforce its visitation order deprived him of a meaningful opportunity to establish a relationship with Michael.

² Marco claims he is entitled to a continuance because Agency needed time to comply with orders to provide visitation and contact with Michael. However, Marco's claim is untimely and not subject to review in this appeal. Once reunification services were terminated, the focus shifted to Michael's needs for permanency and stability, not further opportunities to bond with Marco. (See *In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317, 324-326.) "The Legislature did not contemplate such last-minute efforts to put off permanent placement." (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1197, citing *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310.) Marco's challenge to inadequate visitation could have been, but was not, raised in a writ petition under California Rules of Court, rule 39.1B. (§ 366.26, subd. (l)(1) & (2); see *In re Matthew C.* (1993) 6 Cal.4th 386, 392 [proceeding terminating reunification services and setting selection and implementation hearing is generally a party's last opportunity to litigate issue of parental fitness as to subsequent termination of parental rights].)

A

We review the judgment for substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we must uphold those findings. We do not evaluate the credibility of witnesses, attempt to resolve conflicts in the evidence or determine the weight of the evidence. Instead, we must draw all reasonable inferences in support of the findings, consider the record most favorably to the juvenile court's order and affirm the order even if other evidence supports a contrary finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947; *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination would be detrimental to the child under one of five specified exceptions. (§ 366.26, subd. (c)(1)(A)-(E); see also *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826.)

Section 366.26, subdivision (c)(1)(A) is an exception to the adoption preference if termination of parental rights would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the child and the child

would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the relationship" to refer to a "parent-child" relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from the day-to-day interaction, companionship and shared experiences." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Although day-to-day contact is not required, it is typical in a parent-child relationship. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

B

Here, although Maria regularly visited Michael, she did not show there was a beneficial parent-child relationship sufficient to apply the exception of section 366.26, subdivision (c)(1)(A). Michael, who is now two years old, has been out of Maria's care his entire life. During visits, Michael did not interact much with Maria. He appeared comfortable with her but was equally comfortable with other adults and had no difficulty separating from her at the end of visits. Maria admitted she was emotionally detached from Michael. In the social worker's opinion, Maria did not occupy a parental role in Michael's life. Under these circumstances, Michael "should be given every opportunity to bond with an individual who will assume the role of a parent." (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 854.)

Moreover, no evidence showed severing the parent-child relationship would greatly harm Michael and deprive him of a substantial, positive emotional attachment. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Maria became overwhelmed when interacting with more than one of her children at a time. Although she was loving and affectionate toward Michael during visits, the relationship did not benefit Michael enough to outweigh his need for the permanence and stability of adoption. Because Michael's needs could not be met by Maria, he deserves to have his custody status promptly resolved. After balancing the strength and quality of the parent-child relationship against the security and sense of belonging a new family would give Michael, the court found the preference for adoption had not been overcome. Substantial evidence supports the court's

finding the exception of section 366.26, subdivision (c)(1)(A) did not apply to preclude terminating Maria's parental rights.

C

Marco contends the court's failure to ensure he had visitation and contact with Michael deprived him of the opportunity to develop a beneficial parent-child relationship, thus violating his rights to due process and fundamental fairness.

A parent who believes visitation is inadequate must raise the issue in a timely manner. (*In re Christina L.* (1992) 3 Cal.App.4th 404, 416.) "If the agency is abusing its responsibility in managing the details of visitation, [the parent] may bring that matter to the attention of the juvenile court by way of a section 388 petition to modify the visitation order." (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1010.) Marco never raised the issue of visitation before the selection and implementation hearing. He was present in court with counsel at the six-month review hearing when the court terminated reunification services after finding reasonable services were offered or provided. He did not file a petition for writ review of those findings and orders and is precluded from challenging them now. (§ 366.26, subd. (d)(1) & (2).)

Even if no waiver occurred, Marco cannot show visits with Michael would have resulted in a beneficial parent-child relationship so as to trigger the exception of section 366.26, subdivision (c)(1)(A). Marco had never been Michael's caretaker and the two had never bonded because Marco was incarcerated. Marco made no attempt to communicate with Michael despite authorization of funds for collect telephone calls. Prison visits would not have served to continue or maintain a bond, but could only be

used to create a bond. An infant or toddler does not become bonded with a biological parent merely by visiting him in prison for limited amounts of time. "The kind of parent-child bond the court may rely on to avoid termination of parental rights under the exception provided in 366.26, subdivision (c)(1)(A) does not arise in the short period between the termination of services and the [selection and implementation] hearing." (*In re Richard C*, *supra*, 68 Cal.App.4th at p. 1196 [court properly denied belated request for bonding study].) It was not the lack of visitation that precluded the reunification process, but Marco's lack of concern for Michael's welfare and his failure to take any steps toward completing his reunification plan. No due process violation occurred.

Marco asserts the standard for finding a beneficial parent-child relationship as articulated in *In re Autumn H.*, *supra*, 27 Cal.App.4th 567 and its progeny renders the statutory exception meaningless and creates an insurmountable burden for parents. However, as we stated in *In re Casey D.*, *supra*, 70 Cal.App.4th at page 51, the beneficial relationship standard, while "setting the hurdle high," is not an impossible one and is consistent with a child's right to a safe, stable and permanent home. Those cases do not enlarge a parent's burden, but simply define it. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 821.) Marco's failure to prove the existence of the beneficial parent-child relationship did not result from an impossible burden or an improper statutory interpretation, but from his inability to make the progress necessary to care for Michael and establish a consistent, loving parent-child relationship with him. Substantial evidence supports the court's finding the exception of section 366.26, subdivision (c)(1)(A) did not apply to preclude terminating Marco's parental rights.

III

Maria and Marco contend the sibling relationship exception of section 366.26, subdivision (c)(1)(E) applied to preclude terminating their parental rights. They assert Michael had a strong bond with his four siblings and ongoing contact was in Michael's best interests.

A

The sibling relationship exception to terminating parental rights applies when the juvenile court finds there is a compelling reason for determining that termination would be detrimental to the child due to substantial interference with a child's sibling relationship. (§ 366.26, subds. (c)(1), (c)(1)(E); *In re Celine R.* (2003) __ Cal.4th __ [1 Cal.Rptr.3d 432].) Factors to be considered include the nature and extent of the relationship, whether the child was raised with a sibling in the same home, and whether the child has strong bonds with a sibling. The court must also consider whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption. (§ 366.26, subd. (c)(1)(E).) The purpose of this exception is to preserve long-standing sibling relationships that "serve as anchors for dependent children whose lives are in turmoil." (*In re Erik P.* (2002) 104 Cal.App.4th 395, 404.)

"The sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption." (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 813.) It focuses exclusively on the benefits and burdens to the child being considered for adoption, not the other siblings. (*Ibid.*) Contrary to Marco's and Maria's arguments,

"[n]othing in the statute suggests the Legislature intended to permit a court to not choose an adoption that is in the adoptive child's best interest because of the possible effect the adoption may have on a sibling." (*In re Celine R.*, *supra*, 1 Cal.Rptr.3d at p. 439.)

Although the court should carefully consider all evidence regarding the sibling relationship as it relates to possible detriment to the adoptive child, "the ultimate question is whether adoption would be detrimental to the adoptive child, not someone else. (*Id.* at p. 440.)

Similar to the beneficial parent-child relationship exception, application of the sibling relationship exception requires a balancing of interests. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 951.) However, the parent must first show: (1) the existence of a significant sibling relationship; (2) termination of parental rights would substantially interfere with that relationship; and (3) it would be detrimental to the child if the relationship ended. (*Id.* at p. 952.) Once the parent establishes a sibling relationship is so strong that its severance would be detrimental to the adoptive child, the court then decides whether the benefit to the child of continuing the sibling relationship outweighs the benefit of adoption. (*Id.* at pp. 952-953; see also *In re Megan S.* (2002) 104 Cal.App.4th 247, 254.)

B

Here, Michael has never lived with any of his siblings. Other than weekly visits at McDonald's, Michael did not communicate with them. Maria testified the siblings tried to play with Michael but he was too young to bond with them. In the social worker's opinion, there was no significant sibling relationship and the benefits of stability for

Michael outweighed the detriment of severing the sibling relationship. The court was entitled to find the social worker credible and give great weight to her assessment. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53.) Substantial evidence supports the court's finding the exception of section 366.26, subdivision (c)(1)(E) did not apply to preclude terminating Maria's and Marco's parental rights.

IV

Marco contends the court should have found terminating parental rights was not in Michael's best interests. He urges us to reverse the juvenile court's order and direct it to select a permanent plan other than adoption.

As we already discussed, when efforts to reunify a family have failed, the court must terminate reunification services and set the matter for a selection and implementation hearing under section 366.26. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249.) The focus then shifts to the needs of the child for permanency and stability. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) "The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful." (*Id.* at p. 307; *In re Celine R.*, *supra*, 1 Cal.Rptr.3d at p. 438.) "Adoption is the Legislature's first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) Where, as here, the minor is adoptable, "adoption is the norm." (*In re Celine R.*, *supra*, 1 Cal.Rptr.3d at p. 438.) The narrow issues before the court at the selection and implementation hearing are whether the minor is adoptable

and if so, whether termination of parental rights would be detrimental under one of the enumerated exceptions. (§ 366.26.) "[T]here is no window of evidentiary opportunity for a parent to show that in some general way the 'interests' of the child will be fostered by an order based on some consideration not set forth in section 366.26." (*In re Jennifer J.* (1992) 8 Cal.App.4th 1080, 1090; *In re Jasmine J.* (1996) 46 Cal.App.4th 1802, 1808.) By following the statutory procedure of section 366.26 to select and implement a permanent plan, the court is considering what is best for the minor. (See *In re Jamie R.* (2001) 90 Cal.App.4th 766, 774 [no "best interest" exception exists]; *In re Jessie G.* (1997) 58 Cal.App.4th 1, 8 ["best interest" is implied throughout dependency law]; *In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1165 ["best interest" is inherent in juvenile dependency scheme].) Indeed, the court here made an express finding adoption was in Michael's best interest. Evidence that Michael was likely to be adopted and had no beneficial parent-child or sibling relationship supports that finding.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.